No. 42879-2-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jason Mack,

Appellant.

Cowlitz County Superior Court Cause No. 09-1-00890-3

The Honorable Judge Michael H. Evans

Appellant's Opening Brief

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9. The trial court erred by refusing to allow cross-examination regarding the favorable resolution of Lamson's felony charge, which occurred while Mr. Mack's case was pending.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person is entitled to have the jury instructed on applicable included offenses. Here, the trial judge refused to instruct on the included offense of first-degree manslaughter. Did the trial judge's refusal to instruct on manslaughter violate Mr. Mack's unqualified statutory right to have the jury

consider applicable included offenses, as well as his Fourteenth Amendment right to due process?

2. A prosecutor may not make a "fill in the blank" argument, telling jurors they must be able to articulate their doubt in order to find an accused person not guilty. Here, the prosecutor told jurors that a doubt was not reasonable unless it could be put into words, articulated, and talked about. Did the prosecutor commit misconduct that violated Mr. Mack's Fourteenth Amendment right to due process?

3. A prosecutor may not malign an accused person's attorney or disparage the role of defense counsel. Here, the prosecutor repeatedly disparaged defense counsel and the defense function in his closing argument. Did the prosecutor's misconduct infringe Mr. Mack's Sixth and Fourteenth Amendment rights to counsel and to due process?

4. An accused person has the constitutional right to confront adverse witnesses. Here, the trial court restricted cross-examination regarding the favorable resolution of Lamson's felony charge, which occurred while Mr. Mack's case was pending. Did the restriction on cross-examination violate Mr. Mack's confrontation rights under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In August of 2009, a brawl broke out at the Crosskeys bar in Longview. RP 252, 537, 611, 630. The three combatants at the center of the fight were Lee Pope, Tim Mitchell, and Brian Garner. RP 382, 386, 414, 428, 431, 438-441, 504-506, 897-898. Pope and Mitchell were expelled from the bar; Garner was instructed to sit in a particular chair. RP 282, 283-284, 390, 540, 570, 612. After the fight was over, Garner realized he'd been stabbed in the chest. RP 283-284, 391. He died that same night, and an autopsy revealed that his pulmonary artery had been cut by a single edged blade 3-4" in length, which had been inserted up to its hilt. RP 949-952, 957-958.

Just prior to the fight with Pope and Mitchell, Garner had been involved in an argument with Tasheena Woodward and her boyfriend Jason Mack. RP 278-279, 437, 439, 481-482, 505, 767-768. There was no indication that Mr. Mack (or Ms. Woodward) knew Garner before the night of the stabbing. *See* RP, *generally*. Their argument with Garner had been brief, and had started when Garner involved himself in a dispute Ms. Woodward was having with another woman in the outdoor smoking area of the Crosskey. RP 278-279, 437, 439, 481-482, 505, 767-768.

Three witnesses saw Mr. Mack join in the fight very briefly.[1] According to Andy Redmill, Mr. Mack smashed a beer bottle over Mitchell's head, and then he "reaches around [Pope or Mitchell] and makes a stabbing gesture at Brian's chest." RP 387. Redmill could not see what was in Mr. Mack's hand, but assumed it was the broken bottle, and that's what he told police. RP 389, 404. Ronda Naillon and Nicole Johnson gave a similar version of events (although Johnson's initial statement to police described the fight but did not mention Mr. Mack's participation.) RP 509-511, 519, 900-901, 911, 913-915, 916.

Immediately after the fight, Mr. Mack gave Ms. Woodward a small knife, and told her that the police would be coming "because that guy got hurt or something." RP 483. This interaction was witnessed by another patron, Leonard Jordan (aka "Tattoo Jimmy"). RP 770. Mr. Mack had been loaned the knife by a friend who collected knives; the knife was never recovered by police. RP 255, 257, 258, 485, 580.

Mr. Mack left the area, apparently seeking a ride from someone in the neighborhood. RP 452-455. He returned home briefly to say goodbye to his infant child, and left for Arizona, where he eventually turned

[1] His alleged involvement was so transitory that six other witnesses—including Pope and Mitchell—did not see him at all during the fight. In addition to Pope and Mitchell, these included Jerry Meece (the karaoke DJ), James Timmons (the bartender), Mr. Mack's sister Jamie, and patron Joseph Connelly. RP 327, 443, 446, 545, 569-571, 573, 612-620, 629-631.

himself in and waived extradition. RP 98, 485, 582-584, 634, 682, 744-746.

Mr. Mack was charged with second-degree intentional murder, with second-degree felony murder as an alternative. CP 1.

At his trial, he sought to cross-examine a witness named Larry Lamson, who testified about an interaction with Ms. Woodward regarding her role in receiving and disposing of the knife. RP 794-798. Lamson had been charged with failure to register while Mr. Mack's case was pending. RP 785-786. Although Lamson's standard range was 43-57 months, he pled guilty and received only 24 months in prison. RP 786, 791-792. The man who prosecuted Lamson's case also prosecuted Mr. Mack (although he was not involved with Mr. Mack's case at the time Lamson pled guilty). RP 789-790.

Mr. Mack sought to cross-examine Lamson regarding his case, the favorable resolution he'd received, and any expectation he had relating to his trial testimony. RP 785-791. The prosecution objected, and the court refused to allow cross-examination on the subject. RP 791-793.

Mr. Mack proposed instructions on first-degree manslaughter; however, the court refused to give the instructions. Defendant's Proposed Instructions, Supp. CP; 987-995. Mr. Mack repeatedly took exception to this decision. RP 1007-1008, 1013.

In closing, the prosecutor defined "reasonable doubt" with the following argument:

> If in your deliberations you have doubts, but you can't put them into words, you can't articulate them, you can't talk with your fellow jurors about them, other than just maybe I have some kind of doubt but I can't really express it, that's not a reasonable doubt. RP 1053.

Defense counsel did not object. RP 1053.

Defense counsel did, however, object when the prosecutor began his rebuttal closing as follows:

> MR. SMITH: Mr. Mulligan is right about one thing, which is that I get to go last. That's what I think is always kind of the entertaining part about this job is you get to see what the defense is, what the stories are, what's thrown out there, and it never fails to entertain, I assure you. I've tried a lot of cases. At the end of the case, I have yet to see --
> MR. MULLIGAN: Your Honor, --
> MR. SMITH: The Defense Attorney get up to --
> MR. MULLIGAN: Past cases? This is supposed to be a rebuttal about the evidence.
> JUDGE EVANS: I'll sustain, go ahead.
> MR. SMITH: Yet to see a Defense Attorney --
> MR. MULLIGAN: Your Honor, (inaudible).
> JUDGE EVANS: Go ahead. Go ahead.
> MR. SMITH: I have yet to see a Defense Attorney get up and say, "They proved it."
> MR. MULLIGAN: Your Honor, was the objection sustained?
> JUDGE EVANS: It was, but this is a different line.
> RP 1086.

Despite the court's ruling, the prosecutor continued in a similar vein:

> MR. SMITH: Why haven't we seen it? Because it will never happen. Mr. Mulligan's got a job to do. His job, his duty, is to defend Mr. Mack. We will never see them get up and say, "Oh, boy, they got us." It doesn't matter what the evidence is. Instead we get a story. And it was a humdinger. It was quite a tale. It was witnesses conspiring. It was sinister deeds by the Longview Police Department. Coercion of witnesses. Perjury. Planting of evidence. Implications the police are doing bad things. Everybody is conspiring against Mr. Mack. You see, that's a nice way -- a polite way of saying what that is, is I'm making it up as I go along. Because that's just words, ladies and gentlemen. That's just words. RP 1087.

The prosecutor returned to this theme, repeatedly accusing defense counsel of making up a defense as he went along:

> You can say whatever you want, but if you are going to make an outrageous claim like that, you better bring the goods and we didn't hear a word. There has been no proof of any of that. Any why --
> MR. MULLIGAN: Objection, Your Honor.
> MR. SMITH: Are they making all this up?
> MR. MULLIGAN: (Inaudible) Mr. Pope.
> JUDGE EVANS: So, the jury is instructed to rely on your memory as to the evidence.
> MR. SMITH: Now, why are they making all of this up? It's a smoke screen, because they got to get the attention off Mr. Mack and they have got to put it somewhere else. So they want to do that.
> RP 1088.

> MR. SMITH: So let's come up with a story. And it was a good one. It could have been a John Grisham novel, it could have been a Lifetime movie, but it's not the evidence.
> RP 1088-1089.

> MR. SMITH: Now, I was writing stuff down as we went along, and a lot of this has to do with conspiracy theory stuff. You know, the Prosecution is cooking it up, the police are cooking it up. You know, I think we can rely on our common sense to let us know that

> that's not what's happening here. That's a lot of cynicism from the Defense. There is a denigration of the police. There's a denigration of the State. There's even personal assault -- insults against witnesses.
> RP 1094.

> MR. SMITH: They have got nothing. They can't impeach his testimony in any way. So what they say is, "This guy has a nickname, so don't believe him." They are just grasping at straws, because it's all they got on him.
> RP 1095.

> MR. SMITH: Now, ultimately, and I was wondering if we were going to get to this point. At the very end -- at the very end -- at the very end the Defense puts forward a theory, because it's got to be put forward, because the inevitable question is, if he didn't stab Brian, who did? And they say, "Well it must have been Mitchell and Pope." There's no evidence of that, but we will throw it out there, and we'll say they must have done it. Okay.
> RP 1095.

The prosecutor castigated defense counsel for suggesting that Pope or Mitchell might have stabbed Garner during their altercation:

> MR. SMITH: [T]he guilty try to point the finger at other people like Lee Pope and Tim Mitchell, which is a travesty, because those guys, even though they had just been in a fight with Brian, tried to save his life. And they want to pin the crime on them. For shame. For shame.
> RP 1097.

The prosecutor also speculated that defense counsel would have fabricated a theory to ignore additional eyewitness testimony had it been different:

> They say, "We know it didn't happen, because a few other folks didn't see it happen. Meece didn't see it, Connolly or Timmons." Well, the testimony is he sneaks in, he stabs him, he sneaks out

> quickly. Everybody else is focused on the brawl. He sneaks in, he gets in and gets out. But really they don't care about that, because I will tell you something. If Meece and Connolley had seen it, they would just be part of the conspiracy, because that's the beauty of the conspiracy theory is it requires no proof. It requires no evidence. I just say it, and you are supposed to believe it. They don't really care what any of these witnesses have to say, but if they have anything bad to say they are in a conspiracy, and you can't believe them. They are just picking and choosing. They are making it up as they go along. But the evidence keeps boxing them in, and it is pointing to his guilt, unmistakably.
> RP 1097.

The jury did not find Mr. Mack guilty of second-degree intentional murder. Verdict Form A, Supp. CP. Instead, he was convicted of second-degree murder felony murder with a deadly weapon enhancement. CP 3. He was sentenced to 240 months in prison, and he timely appealed. CP 3, 16.

ARGUMENT

I. THE TRIAL JUDGE VIOLATED MR. MACK'S STATUTORY AND CONSTITUTIONAL RIGHT TO HAVE THE JURY CONSIDER ALL APPLICABLE INCLUDED OFFENSES.

A. Standard of Review

Ordinarily, a trial court's refusal to give a proposed instruction is reviewed for an abuse of discretion.[2] *State v. George*, 161 Wash. App. 86,

[2] Unless the refusal is based on an issue of law; in such cases, review is *de novo*. *George, at* 94-95.

94-95, 249 P.3d 202, *review denied,* 172 Wash. 2d 1007, 259 P.3d 1108 (2011). However, the trial court's discretion is subject to the requirements of the constitution: a court necessarily abuses its discretion by denying an accused person her or his constitutional rights. *See, e.g., State v. Iniguez*, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009). Accordingly, where the appellant argues that refusal to give a proposed instruction infringes a constitutional right, review is *de novo*. *Id.*

B. The refusal to instruct on first-degree manslaughter denied Mr. Mack his unqualified statutory right to have the jury consider any applicable included offense.[3]

An offense is an "included offense"[4] if two conditions are met: (1) each element of the included offense must be a necessary element of the crime charged, and (2) the evidence in the case must support an inference that only the lesser crime was committed. *State v. Nguyen*, 165 Wash. 2d 428, 434-35, 197 P.3d 673 (2008) (citing *State v. Workman,* 90 Wash.2d 443, 584 P.2d 382 (1978)). The right to an appropriate included offense instruction is "absolute;" failure to give such an instruction requires reversal. *State v. Parker,* 102 Wash.2d 161, 164, 683 P.2d 189 (1984).

[3] Because no constitutional rights are implicated by Mr. Mack's statutory argument, the abuse of discretion standard applies to this section. *George, at* 94-95.

[4] The word "included" is more appropriate than the phrase "lesser included," because the two offenses may carry the same penalty. *Nguyen, at* 434-435.

An accused person has an "unqualified right" to have the jury consider any applicable included offenses if there is "even the slightest evidence" that the accused person may have committed only that offense. *Id, at* 163-164; RCW 10.61.003; RCW 10.61.010. The evidence is viewed in a light most favorable to the instruction's proponent, and the instruction must be given even if there is contradictory evidence or a defense theory that is inconsistent with the instruction. *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000).

If the prosecution files alternative charges, the defendant is entitled to instructions on any included offense of either charge. This is so even if the included offense is not also included within the other alternative charge. *State v. Schaffer*, 135 Wash.2d 355, 359, 957 P.2d 214 (1998). For example, a defendant charged (in the alternative) with both premeditated murder and felony murder is entitled to instructions on manslaughter, even though manslaughter is not an included offense of felony murder. *Id, at* 358-359.

First-degree manslaughter is an offense included within intentional murder, under legal prong of the *Workman* test. *State v. Berlin*, 133 Wash. 2d 541, 550-51, 947 P.2d 700 (1997). Conviction of second-degree intentional murder requires proof that the defendant killed another person intentionally. RCW 9A.32.050; Instructions Nos. 8-9, Supp. CP.

Conviction of manslaughter requires proof that the defendant recklessly caused the death of another person. RCW 9A.32.060; Defendant's Proposed Instructions, Supp. CP. Because proof of intent also establishes recklessness, proof of intentional murder necessarily establishes manslaughter. *See* RCW 9A.08.010(2); *see also Berlin, at* 550-551. Thus manslaughter is included within second-degree intentional murder. *Id.*

Here, taking the facts in a light most favorable to Mr. Mack, there was at least "slight[] evidence" that he was guilty only of first-degree manslaughter, and not intentional murder. *Parker, at* 163-164. First, as the state argued at trial, the evidence can be interpreted to show that Mr. Mack intentionally stabbed Garner: Redmill, Naillon, and Johnson said they saw Mr. Mack thrust at Garner, and Woodward testified that she received a knife from Mr. Mack shortly after the stabbing. RP 387, 389, 404, 483, 509-511, 519, 770, 900-901, 911, 913-915, 916.

Second, the evidence suggests that Mr. Mack did not intend to kill Garner, even if he stabbed him intentionally. The scene was chaotic, and Garner was wrestling with two other assailants when the stabbing apparently occurred. RP 387, 389, 404, 509-511, 519, 900-901, 911, 913-915, 916. Redmill testified that Mr. Mack had to reach around Mitchell or Pope in order to stab Garner in the torso. RP 387. Mr. Mack made no statements indicating that he planned to kill Garner, and he told

Woodward (as he left the scene) that someone got "hurt;" he did not say that someone got killed or fatally wounded. RP 483, 771, 783. There is no indication he specifically planned to sever Garner's pulmonary artery,[5] or otherwise to inflict a mortal wound.[6] *See* RP *generally*.

This evidence, when taken in a light most favorable to Mr. Mack, affirmatively suggests that he intentionally stabbed Garner, but did not intend to kill him. The jury's decision not to convict Mr. Mack of intentional murder shows the reasonableness of this conclusion. Verdict Form A, Supp. CP.

Under this view of the evidence—adopted by the jury and reflected in its verdict—Mr. Mack was guilty of first-degree manslaughter, but not second-degree intentional murder. Accordingly, the trial judge should have instructed on the included offense. *Berlin, supra.* The court's failure to do so requires reversal. *Parker, at* 164. The case must be remanded for

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[5] *See* RP 949-952, 957-958.

[6] Furthermore, the insult that allegedly precipitated the stabbing was relatively minor; jurors could conclude that it would not have led Mr. Mack to intentionally kill Garner. RP 278-279.

a new trial, with instructions to allow the jury to consider first-degree manslaughter as an included offense.[7] *Id; Fernandez-Medina, at* 456.

C. The refusal to instruct on first-degree manslaughter denied Mr. Mack his Fourteenth Amendment right to due process.[8]

Refusal to instruct on an included offense can violate the right to due process under the Fourteenth Amendment. U.S. Const. Amend. XIV; *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (1988). The constitutional right to such an instruction stems from "the risk that a defendant might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free." *Vujosevic, at* 1027. *See also Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (In capital cases, "providing the jury with the 'third option' of convicting on a lesser included offense ensures that the jury will accord the defendant the full benefit of the reasonable doubt standard...").[9]

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[7] The instruction must be given even though retrial on intentional murder is barred by double jeopardy principles. *Schaffer, at* 358-359; *see State v. Ervin*, 158 Wash. 2d 746, 753, 147 P.3d 567 (2006) (discussing implied acquittal).

[8] This argument is parallel to the statutory argument. It is included because constitutional error is reviewed *de novo*, and to permit Mr. Mack to pursue the issue in federal court should his appeal be denied.

[9] The court in *Beck* explicitly reserved the question of whether or not the rule applies in noncapital cases. *Beck, at* 638, n.14. Some federal courts only review a state court's failure to give a included instruction in noncapital cases when the failure "threatens a fundamental miscarriage of justice..." *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990).

Here, the jury was forced to either acquit or convict Mr. Mack of intentional murder; they did not have "the 'third option' of convicting on a lesser included offense..." *Beck, at* 634. Because the trial judge refused to instruct the jury on the included offense, Mr. Mack was denied his constitutional right to a fair trial under the due process clause. U.S. Const. Amend. XIV; *Vujosevic.* The conviction must be reversed and the case remanded to the superior court. *Id.*

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MR. MACK'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL AND TO DUE PROCESS.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo. Bellevue School Dist. v. E.S.,* 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.[10] *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009).

To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140

[10] Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wash.App. 794, 800, 998 P.2d 907 (2000).

Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke,* 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

B. The prosecutor infringed Mr. Mack's right to due process by making a "fill in the blank" argument.

It is misconduct for a prosecutor to make a "fill in the blank" argument by suggesting that jurors are required to articulate a reason for their doubt before they can vote to acquit. *State v. Walker*, 164 Wash. App. 724, 731-32, 265 P.3d 191 (2011). The argument is "a misstatement about the law and the presumption of innocence due a defendant, the 'bedrock upon which [our] criminal justice system stands,' [and] constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *State v. Johnson*, 158 Wash. App. 677, 685-86, 243 P.3d 936, 940-41 (2010) *review denied,* 171 Wash. 2d 1013, 249 P.3d 1029 (2011) (quoting *State v. Bennett,* 161 Wash.2d 303, 315, 165 P.3d 1241 (2007)).

Here, the prosecutor told jurors that a doubt was not reasonable unless it could be put into words, articulated, and talked about.[11] RP 1153.

[11] Although defense counsel did not object, the issue can be addressed for the first time on appeal for two reasons: (1) the misconduct created a manifest error affecting Mr. Mack's right to due process, *see* RAP 2.5, and (2) the misconduct was so flagrant and ill-

This undermined the presumption of innocence and the burden of proof, and violated Mr. Mack's Fourteenth Amendment right to due process. *Walker, at* 731-732. His conviction must be reversed and the case remanded for a new trial. *Id.*

C. The prosecutor infringed Mr. Mack's constitutional rights to counsel and to due process by disparaging the role of defense counsel and impugning counsel's integrity.

It is improper for a prosecuting attorney to comment disparagingly on defense counsel's role or to impugn the defense lawyer's integrity. *State v. Thorgerson*, 172 Wash.2d 438, 451-452, 258 P.3d 43 (2011) (citing *State v. Warren,* 165 Wash.2d 17, 195 P.3d 940 (2008) and *State v. Negrete,*72 Wash.App. 62, 67, 863 P.2d 137 (1993)). Thus, for example, a prosecutor who characterizes defense counsel's presentation "as 'bogus' and involving 'sleight of hand'" improperly impugns counsel's integrity. *Thorgerson, at* 451-452.

Here, the prosecutor repeatedly disparaged defense counsel and the defense role. He claimed to be "entertain[ed] by the "stories… thrown out there" by defense counsel, and said he'd never seen a defense attorney

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intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction. *Walker, at* 730.

"get up and say, 'They proved it.'" RP 1086. He went on to say that a defense attorney's "got a job to do," that it "doesn't matter what the evidence is," defense counsel will always come up with "a story." RP 1087.

He described the "story" in this case as a "humdinger," and "quite a tale," and accused defense counsel of "making it up as [he went] along." RP 1087. He disparaged defense counsel for making "an outrageous claim" without "bring[ing] the goods" to prove it, and accused him of "making all of this up" as "a smoke screen, because they got to get the attention off Mr. Mack." RP 1088. He accused defense counsel of "com[ing] up with a story" that "could have been a John Grisham novel, it could have been a Lifetime movie..." RP 1088-1089. He described defense counsel's closing as "cynicism," and suggested counsel was guilty of "denigration of the police," "denigration of the State," and insulting witnesses. RP 1094. He argued that the defense was "grasping at straws." RP 1095.

The prosecutor told jurors that the defense had "put[] forward a theory, because it's got to be put forward, because the inevitable question is, if he didn't stab Brian, who did?" and then criticized the defense theory for being "throw[n] out there" without evidentiary support. RP 1095. He condemned defense counsel for "point[ing] the finger at other people,"

describing this strategy as "a travesty," and added: "For shame. For shame." RP 1097. He hypothesized that defense counsel would invent additional stories if necessary to counter additional evidence,

> because that's the beauty of the conspiracy theory... it requires no proof. It requires no evidence. I just say it, and you are supposed to believe it. They don't really care what any of these witnesses have to say, but if they have anything bad to say they are in a conspiracy, and you can't believe them. They are just picking and choosing. They are making it up as they go along.
> RP 1097

These comments suggested that the role of defense counsel is to fabricate lies, without consideration for the evidence presented. The prosecutor's entire rebuttal closing improperly disparaged defense counsel and maligned the defense role. *Thorgerson, at* 451-452. The arguments infringed Mr. Mack's Sixth and Fourteenth Amendment right to counsel by burdening the exercise of that right. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Toth, supra.*

III. THE TRIAL COURT VIOLATED MR. MACK'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION BY RESTRICTING CROSS-EXAMINATION OF LAMSON ON A MATTER RELATING TO BIAS.

A. Standard of Review

Although evidentiary rulings are ordinarily reviewed for an abuse of discretion, this discretion is subject to the requirements of the Sixth Amendment. *United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir.

1992). Where a limitation on cross-examination directly implicates the values protected by the Sixth Amendment's confrontation clause, review is *de novo*. *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010).

B. The Sixth and Fourteenth Amendment guarantee an accused person the right to confront adverse witnesses, particularly on matters pertaining to credibility and bias.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amend VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The primary and most crucial aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wash.2d 441, 455-56, 957 P.2d 712 (1998); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). The purpose of cross-examination

> ...is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded.

State v. Darden, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002) (citations omitted).

Where credibility is at issue, the defense must have wide latitude. *State v. York*, 28 Wash.App. 33, 621 P.2d 784 (1980). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the

evidence "must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial." *Darden, at* 621.

The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible unless the state can show a compelling interest to exclude prejudicial or inflammatory evidence. *Darden, at* 621; *see also* ER 401, ER 402. Where evidence is highly probative, no state interest can be compelling enough to preclude its introduction. *State v. Jones*, 168 Wash.2d 713, 721, 230 P.3d 576 (2010) (citing *State v. Hudlow*, 99 Wash.2d 1, 16, 659 P.2d 514 (1983).

C. The trial judge erroneously restricted cross-examination designed to elicit Lamson's bias.

An accused person "has a constitutional right to impeach a prosecution witness with bias evidence." *State v. Spencer*, 111 Wash.App. 401, 408, 45 P.3d 209 (2002). Cross-examination designed to elicit witness bias directly implicates the Sixth Amendment. *Martin, at* 727. Evidence demonstrating witness bias is relevant and admissible. *United States v. Abel*, 469 U.S. 45, 50-51, 55-56, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (interpreting Federal Rules of Evidence).

An accused person must be allowed to cross-examine a witness regarding any expectation that his testimony might affect the resolution of

other unrelated charges involving the witness. *Martin, at* 727-730. A witness with such expectations may have "a desire to curry favorable treatment" in connection with the uncharged crimes. *Martin, at* 727.[12] The absence of an explicit agreement "does not end the matter;" nor does the fact that an accused has been "permitted to examine other matters relating to [the witness's] alleged bias." *Martin, at* 728-730.

Here, the trial court should have allowed Mr. Mack to cross-examine Lamson regarding bias. While Mr. Mack's case was pending, Lamson was charged with failure to register. RP 785-786. His standard sentencing range upon conviction was 43-57 months in prison; however, he pled guilty and received an exceptional sentence downward of only 24 months. RP 786, 791-792. The man who prosecuted him served as second chair in Mr. Mack's trial (although he was not involved with Mr. Mack's case at the time Lamson pled guilty). RP 789-790. Under these circumstances, Lamson may have believed that his low sentence would be placed in jeopardy if he failed to testify in accordance with the government's wishes. Mr. Mack should have been permitted to expose this bias to the jury. *Martin, at* 727-730.

[12] In *Martin*, for example, a witness was implicated in a murder investigation unrelated to the crime with which the defendant had been charged. The Seventh Circuit held that refusal to allow cross-examination about the murder investigation infringed the defendant's confrontation right. The court concluded that the error was harmless, because the witness did not provide significant information in the prosecution of the case.

The erroneous exclusion of evidence establishing bias violated Mr. Mack's Sixth and Fourteenth Amendment right to confrontation. *Spencer, at* 408; *Martin, at* 727. Accordingly, his conviction must be reversed and the case remanded for a new trial, with instructions to allow cross-examination regarding Lamson's felony charge. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Mack's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on May 31, 2012,

BACKLUND AND MISTRY

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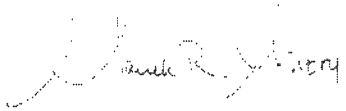

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jason Mack, DOC #304373
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
sasserm@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 31
, 2012.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

May 31, 2012 - 12:35 PM

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